

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 08-07

October 22, 2007

TO: All Division Heads, Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Dana Corp., 351 NLRB No. 28 (September 29, 2007)

Introduction

In *Dana Corp.*, 351 NLRB No. 28 (September 29, 2007), the Board modified its recognition-bar doctrine, and held that an employer's voluntary recognition of a labor organization does not bar a decertification or rival union petition that is filed within 45 days of unit employees' receiving notice of the voluntary recognition. The Board's decision also establishes a new responsibility for a Region when it is notified about a voluntary recognition by a party to that agreement.

This memorandum will discuss the *Dana* decision and the changes it makes to the Board's recognition bar and, to a lesser extent, contract bar principles. The memorandum will then discuss the new procedure announced by the Board in *Dana* that will be followed when a party to a voluntary recognition asks the Board to provide notification to unit employees about the voluntary recognition. Finally, the memorandum will address the procedures that Regions should follow when they receive a request from a party to provide unit employees with notification of a voluntary recognition.

The Dana Corp. Decision

The decision in *Dana* modifies the principles of recognition bar and contract bar. Under the Board's former recognition-bar policy, established in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), an employer's voluntary recognition of a union, based on a showing of the union's majority status, barred a decertification petition filed by employees or a rival union's petition for a reasonable period of time. The premise underlying this policy was that labor-relations stability was promoted by a rule under which a voluntarily recognized union was insulated from challenges to its status while negotiating for a first collective-bargaining agreement.

In *Dana*, the Board majority concluded that although the basic justifications for providing an insulated period are sound, they do not warrant immediate imposition of an election bar following voluntary recognition. The Board held that achieving a "finer

balance” between the often “competing interests of protecting employee freedom of choice on the one hand, and promoting the stability of bargaining relationships on the other,” warrants delaying the imposition of a recognition bar for a 45-day window period, during which unit employees can decide whether they want to seek a Board-conducted election. Under this new policy, an employee or rival union may file a petition during a 45-day period following notice that a union has been voluntarily recognized. The petition will be processed if it is supported by 30 percent of the bargaining unit. The Board determined that this new procedure will be applied prospectively only.

Board Notification to Unit Employees about a Voluntary Recognition

The Board in *Dana* modified two aspects of the recognition-bar doctrine. First, henceforth there will be no bar to an election following a grant of voluntary recognition unless affected unit employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days of their receiving such notice. Second, if 45 days pass from the date that unit employees are provided the requisite notice of the voluntary recognition, then the recognized union’s status will be irrebuttably presumed for a reasonable period of time. (*Dana Corp.*, 351 NLRB slip op. at 8). The Board also stated that these rules apply notwithstanding the execution of a collective-bargaining agreement following voluntary recognition. *Id.*

The Board in *Dana* crafted a new procedure for providing unit employees with notice of a voluntary recognition sufficient to trigger the 45-day period. An employer and/or union that is a party to the voluntary recognition “...must promptly notify the Regional Office of the Board, in writing of the grant of voluntary recognition.” *Id.*, at p. 10. The notification to the Regional Office must include a copy of the recognition agreement, which must be reduced to writing and must describe the unit and the date of recognition. *Id.*, at 10 fn. 38. Upon receipt of the requisite notice of voluntary recognition, the Region shall send an official NLRB notice to the Employer to be posted in conspicuous places at the workplace throughout the 45-day period.

Procedures for Providing Voluntary Recognition Notice

1. Notices

Attached to this memorandum is language for insertion into a notice form (Attachment 1) that shall be used by a Regional Office when it receives formal notice of a voluntary recognition as described in *Dana*. Notice forms for *Dana* notices will be distributed to the Regions shortly. The forms will require the insertion of certain information, including:

- in the first paragraph under the “**Please Be Advised**” heading, the date of the voluntary recognition, the name of the Employer, the name of the Union and the description of the bargaining unit;

- in the last paragraph, the name, address and phone number of the Region (or Subregion or Resident Office, if appropriate) to contact to file a petition or receive additional information; and
- at the bottom of the notice, in 8-point font, the date the notice forms were transmitted to the Employer.

The notice also includes a space for the Employer to insert the date when the notice is posted. Having the Employer enter this information on the notice is designed to inform unit employees when the 45-day window period begins to run, a crucial piece of information under the procedure adopted by the Board in *Dana*.

Also attached are two other forms that are to be sent to an employer, along with the notice. Attachment 2 is a standard letter that is to be sent to an employer explaining the procedures for the posting of the notice. A copy of this letter should also be sent to the voluntarily recognized union, along with a copy of the *Dana* notice. Attachment 3 is a certification of posting form that an employer is asked to complete and return to the Region at the close of the notice posting period. This certification form very closely resembles other Agency forms used for verifying the posting of notices.

2. Files and Required Information

The notice posting procedure introduced by the *Dana* decision will require Regions to secure a written copy of the voluntary recognition, including the date of the grant of recognition and a description of the unit. The Region should also ensure that it has the complete names of the parties to the extension of voluntary recognition.

To the extent feasible, Regions should follow standard casehandling procedures when receiving notification of voluntary recognition pursuant to *Dana Corp.* A case file should be created and the processing of the notices should be assigned to a Board agent. The tab on the file should be marked as follows:

(Region Number)-VR-(Number) Name of Employer

Thus, if Region 45 received its first request for the issuance of notice of voluntary recognition, the matter would be designated 45-VR-1.

The Region should then proceed to prepare the notice forms and the accompanying documents. With respect to the number of notices that should be provided to the employer, Regions should follow the same procedures used when determining how many Notice of Election forms to send in advance of a representation election. Regions should ensure that an adequate number of notices are always provided.

Regions should make every effort to expedite the processing of notices when voluntary recognition notice is provided pursuant to *Dana*. The Board's decision creates a 45-day window period, but that period only begins to run when unit employees receive

the requisite notice. To ensure that the period between the voluntary recognition and the imposition bar is appropriately limited barring the filing of a petition, Regions should act expeditiously to provide employers with notices for posting. It is contemplated that a high percentage of these requests will come from parties that desire to cooperate with the Agency in expediting this process. In most cases it should not be difficult to obtain the required information about the number of notices that should be provided at the sites where the notices should be posted. Of course, not every circumstance can be anticipated, but Regions should give the same high priority to the processing of these notices as they provide to the processing of representation petitions. Accordingly, the requisite number of official notices should be sent to the Employer via expedited or overnight service.

After the *Dana* notices have been sent, the file should remain “open” until the end of the 45-day posting period. As the procedure provides for the Employer to provide the Region with a certificate of posting at the close of the posting period, that document should be placed in the file. Regions should make diligent efforts to obtain a completed certificate of posting. The Region should “close” the file after receiving the completed certification or, if the completed form is not provided, after having made a diligent effort to obtain it.

3. Entry of Data Concerning a *Dana* Request for Notice of Voluntary Recognition

The Agency will maintain a nationwide database of *Dana* requests received, which will include the following information:

1. Request Number
2. Date of Request
3. Employer
4. Union
5. Unit Description
6. Date Notices Sent
7. Receipt of Certificate of Posting
8. Date Notices Posted
9. Date Posting Closes
10. Date of R Case Petition (if any)
11. R Case Number

Attached (Attachment 4) to this memorandum are instructions for entering this information into an e-Room database.

Conclusion

The decision in *Dana* establishes a new responsibility for the Regional Offices to notify employees about a voluntary recognition and their right to file a petition within a 45-day window period. Undoubtedly, issues will arise about this new procedure and

how the Agency should fulfill its responsibility. As in other aspects of casehandling, the Board will address these issues on a case-by-case basis. In addition, experience often results in the Agency modifying its casehandling procedures to adapt to circumstances. The procedures adopted by this memorandum are an initial effort to implement the new responsibility delegated to the Regional Offices by the Board in *Dana*. I am confident that all Agency personnel will devote their best efforts to the successful implementation of this new procedure. To ensure that its employees are prepared to handle all aspects of the *Dana* notice procedure, including responding to inquiries from members of the public about related issues, Regions should conduct training on the *Dana* decision and the new procedures within the near future.

If you have any questions about the matters raised by this memo or if your Region encounters a complex or novel issue concerning the implementation of the *Dana* notice procedure, please contact your Assistant General Counsel or Deputy.

/s/
R. A. S.

Attachments

cc: NLRBU
Release to the Public

MEMORANDUM OM 08-07

NOTICE TO EMPLOYEES

FROM THE
NATIONAL LABOR RELATIONS BOARD

PLEASE BE ADVISED OF THE FOLLOWING:

- On (insert date), your Employer (insert name of Employer) recognized the (insert name of Union) as the unit employees' exclusive bargaining representative based on evidence indicating that a majority of employees in the following bargaining unit desire its representation:

(Insert description of bargaining unit)

- All employees, including those who previously signed cards in support of the Union, have the right to a secret ballot election conducted by the National Labor Relations Board to determine whether a majority of the voting employees wish to be represented by the Union, another union or by no union at all, as provided below.
- Within **45** days from the date of the posting of this notice, a decertification petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not unit employees wish to be represented by the Union. Within the same 45-day period, a representation petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board to determine whether or not unit employees wish to be represented by another union.
- Any properly supported petition filed within the 45-day period will be processed according to the Board's normal procedures.
- If no petition is filed within 45 days from the date of the posting of this notice, then the Union's status as the unit employees' exclusive bargaining representative will not be subject to challenge for a reasonable period of time to permit the Union and your Employer an opportunity to negotiate a collective-bargaining agreement.

Contacting the NLRB – If you are interested in filing a petition for a secret-ballot election or receiving more information about the matters covered by this notice, you should contact the NLRB office at:

(Insert name, address and phone number of Region, Subregion or Resident Office)

Additional information about the NLRB and the National Labor Relations Act is available at the Agency’s website: www.nlr.gov, or by calling the NLRB toll-free at 1-866-667-6572.

(Date of Posting)

NATIONAL LABOR RELATIONS BOARD

an agency of the

UNITED STATES GOVERNMENT

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED

Provided to the Employer on (insert date mailed or delivered)

(Insert name and address of Employer)

Re: Voluntary Recognition Notice
(Insert *Dana* number)

Dear :

On (insert date), this office received formal notification that you voluntarily recognized (insert name of Union) as the exclusive bargaining representative of the employees in the following unit:

(insert unit description)

Pursuant to the decision of the National Labor Relations Board in Dana Corporation, 351 NLRB #28 (2007), in order for an employer's voluntary recognition of a union to serve as a bar to the processing of a representation election, unit employees must receive notification from the NLRB about the employer's recognition of the union and the employees' right to petition for a secret-ballot representation election within 45 days of the posting of the Board's notice.

Enclosed are NLRB notices that advise employees about the Employer's voluntary recognition of the Union and inform them of the right to file a representation petition with the NLRB. Please post copies of these official notices in conspicuous places where notices to employees are customarily posted. The notices should remain posted for 45 consecutive days. **Please enter the initial posting date on the designated line of the notices.** If the notices remain posted for 45 consecutive days and if during that period no representation petition is filed with the NLRB, then, pursuant to the decision in Dana Corporation, the Employer and Union will be entitled to a recognition bar for a reasonable period of time to afford them the opportunity to negotiate a collective-bargaining agreement. Similarly, in the absence of the filing of a decertification or rival petition, if the Employer and Union have negotiated a collective-bargaining agreement prior to the end of the 45-day notice period, then at the close of that period the agreement will bar the processing of a representation petition in accordance with the Board's contract bar rules.

You will also find enclosed a Certification of Posting form. At the conclusion of the 45-day posting period, please enter the information requested by this form and return it to this office.

If you have any questions about the notices or other matters, please contact this office at (insert phone number)

Very truly yours,

Regional Director

cc: (Insert name and address of Union)

**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
CERTIFICATION OF POSTING OF *DANA* NOTICES**

(Name of Employer)

(Dana Number)

The NOTICE TO EMPLOYEES in the above-captioned matter was conspicuously posted starting on _____ at the following locations for
(insert date)
45-consecutive days (Be specific, e.g. “on the bulletin board next to the time clock at the (insert location(s) of facility); on the south wall of the employee lunchroom (insert location(s) of facility”):

(Attach additional pages if necessary)

By: _____

Title: _____

Date: _____

This form should be returned to the Regional Office upon completion of the 45-day posting period.

(Insert Address of Regional Office)